IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 471

RUPERT N. DUNN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the District Court of Appeal of the State of California, in and for the Third Appellate District, affirming the judgment of conviction, is reported in the case of *People* vs. *Dunn* in 102 Cal. App. Dec. (Advance Sheets), 154; 104 Pac. (2d) (Advance Sheets) 119.

The petition for rehearing was denied by the District Court of Appeal of the State of California in and for the Third Appellate District, on July 17, 1940, no opinion being filed.

The petition for hearing in the Supreme Court of California, after decision in the District Court

of Appeal of the State of California in and for the Third Appellate District, was denied on July 30, 1940, no opinion being filed.

STATUTES INVOLVED

Petitioner herein was convicted after trial by jury of the crime of grand theft, a felony (California Penal Code, Section 484).

STATEMENT OF THE MATTER INVOLVED

Petitioner's sole contention here is that section 484 and section 952 of the Penal Code of California are unconstitutional in that they violate the due process clause of the Federal Constitution.

As will be pointed out, *infra,* section 484 of the Penal Code of California was amended in 1927, amalgamating the three closely related crimes of larceny, embezzlement and obtaining money under false pretenses under the crime of *theft.*

Section 489 defines grand theft (over $200).

Section 490a provides:

> "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

Section 952 thereof reads:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has

committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

Therefore, under the California statutes, all that is necessary is an allegation in the information that "defendant *took* the property of another" (describing it).

The relevant portion of the information in the instant case charged as follows:

> "Count III charged in substance that 'on or about the 12th day of December, 1938 * * * the defendant did * * * steal, take and carry away the sum of $250.00 * * * of the personal property of Fred M. Kay.'
>
> Count IV charged in substance that 'on or about the 1st day of March, 1939 * * * the defendant did * * * steal, take and carry away the sum of $765.00 * * * of the personal property of Fred M. Kay.' "

Petitioner urges that he was denied due process of law under the Federal Constitution; that the acts of the State of California in amalgamating these three felonies in one statute (section 484,

Penal Code) under the heading of *theft,* and charging petitioner in an information reciting that he "took" the property of another (section 952, Penal Code) are in violation of his constitutional rights to be informed of the nature of the charges against him.

I

Sections 484 and 952 of the Penal Code of California Are Not Violative of the Due Process Clause of the Federal Constitution

At the outset it will be observed that the information by which petitioner was charged was clearly within the language of the statutes, *supra.* Therefore, there is no question here involved of the uncertainty of the language of the information. The sole question here is whether or not the State of California had a legal right to adopt sections 484 and 952 of the Penal Code as a portion of its criminal procedural laws.

In the instant decision the highest courts of California answered petitioner's contention as follows:

> "It is urged that Sections 484 and 952 of the Penal Code are unconstitutional as being in violation of the due process clause of the Constitution of the United States, (Fourteenth Amendment), in that an information drawn thereunder gives the defendant no information as to the nature of the accusation against him. This question was decided adversely to appellant in the case of *People v. Robinson,* 107 Cal. App.

211, where a hearing was denied by the Supreme Court. The motion in arrest of judgment was therefore properly denied." (*People* vs. *Dunn,* P. xiii of Appendix A, Petition for Certiorari herein.)

Before discussing the case of *People* vs. *Robinson, supra,* respondent would like to call the attention of this Court to the California Supreme Court case of *People* vs. *Myers,* 206 Cal. 480; 275 Pac. 219, decided in 1929, two years after the statutes in question had been operating. The Court there says:

"The amendment to section 484, in connection with other cognate legislation such as the amendments to sections 951 and 952 of the Penal Code (Stats. 1927, p. 1043), is designed not only to simplify procedure but also to relieve the courts from difficult questions arising from the contention that the evidence shows the commission of some other of these crimes than the one alleged in the indictment or information, a contention upon which defendants may escape just conviction solely because of the border line distinction existing between these various crimes.

The conclusion we have announced has heretofore either been expressly or impliedly given forth in the following cases: *People* v. *Plum,* 88 Cal. App. 575 (263 Pac. 862); *People* v. *Giron,* 94 Cal. App. 53 (270 Pac. 462). In the latter case the sole ground of appeal was that the information did not charge a public offense for the reason that under the amendments to the Penal

Code adopted in 1927 there is no such thing as larceny. The information was not amended. After discussion, Mr. Justice Conrey disposes of the question as follows: 'So far as the new definition of larceny is concerned, the change of name is one of form and not of substance. The amendments did not wipe out the common-law definition of larceny, nor did they destroy the universal meaning of the word wherever English is spoken, that larceny is a form of theft. To think otherwise would be to defy common sense.' "

In the case of *People* vs. *Bratton,* 125 Cal. App. 337; 14 Pac. (2d) 125, we find this language, at page 341:

"Since the amendment of section 484 of the Penal Code (Stats. 1927, p. 1046) the crimes of larceny, embezzlement and false pretenses have been included within the crime of theft. In the case of *People* vs. *Myers,* 206 Cal. 480 (275 Pac. 219), it was held that this amendment was designed to simplify procedure and to relieve courts from technical questions arising from contentions that the evidence shows the commission of one of these crimes other than that alleged in the information. It has been specifically held that where an information charged the defendant with the crime of theft by feloniously taking money or property belonging to the complaining witness, that theft by means of what is generally known as embezzlement was included within the information and proof of such was admissible under the allegations of the

information and would sustain a conviction under its terms. (*People* v. *Fewkes,* 214 Cal. 142 (4 Pac. (2d) 538); *People* v. *Murakami,* 122 Cal. App. 221 (9 Pac. (2d) 583).)"

See also:

People vs. *Roth,* 137 Cal. App. 592, 601; 31 P. (2) 813;

People vs. *Bratten,* 137 Cal. App. 658, 659; 31 P. (2) 210;

People vs. *Breyer,* 139 Cal. App. 547, 550; 34 P. (2) 1065, 1067.

So also *People* vs. *Brock* (1937), 21 Cal. App. (2d) 601, 608; 70 P. (2) 210:

"The effect of section 484 as it now appears is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. (*People* v. *Myers,* 206 Cal. 480, 483 (275 Pac. 219); *People* v. *Bratton,* 125 Cal. App. 337, 341 (14 Pac. (2d) 125).) Respondent in charging that appellant had committed the crime of grand theft was not required to allege expressly the kind of grand theft of whose commission he was accused. (*People* v. *Fewkes,* 215 Cal. 142, 149 (4 Pac. (2d) 538).) It was sufficient to allege generally an accusation of grand theft and if the evidence produced in support of the charge established that appellant had committed the crime of embezzlement and that the court wherein the cause was tried had jurisdiction of the action appellant's primary contention which is directed to the matter of venue is not sustainable."

As was said in *People* vs. *Jackson,* 24 Cal. App. (2) 182, at page 203:

> "However, as has been heretofore pointed out, the effect of section 484 of the Penal Code as it now reads is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. (*People* v. *Myers,* 206 Cal. 480, 483 (275 Pac. 219); *People* v. *Bratton,* 125 Cal. App. 337, 341 (14 Pac. (2d) 125); *People* v. *Brock,* 21 Cal. App. (2) 601 (70 Pac. (2d) 210).) There is no inconsistency between sections 484 and 532 of the Penal Code and the applicable provisions of the former have in effect repealed the identical provisions of the latter. (*People* v. *Carter,* 131 Cal. App. 177, 182 (21 Pac. (2d) 129).)."

Turning now to the case of *People* vs. *Robinson,* 107 Cal. App. 211; 290 Pac. 470, referred to in the instant decision as conclusive upon the point, we find that the question has long since been squarely decided and settled by the courts of California. We quote from that decision, at page 217:

> "Section 950 of the Penal Code requires that the indictment contain a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended, and section 952 of the same code provides that in charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. *Due process of law requires only that the accused be given sufficient notice of the nature of the charge*

against him (*Rogers* v. *Peck,* 199 U. S. 425 (50 L. Ed. 256, 26 Sup. Ct. Rep. 87); *Garland* v. *Washington,* 232 U. S. 642 (58 L. Ed. 772, 34 Sup. Ct. Rep. 456)) *to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense (United States* v. *Simmons,* 96 U. S. 360 (24 L. Ed. 819)). *The state, however, has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states (Ex parte Reggel,* 114 U. S. 642, 651 (29 L. Ed. 250, 5 Sup. Ct. Rep. 1148, see, also, Rose's U. S. Notes)), and in *People* v. *Nolan,* 144 Cal. 75 (77 Pac. 774), where the defendant, an accomplice, was charged in the information as a principal in conformity with section 971 of the Penal Code, it was held that the pleading was sufficient notice of the nature of the accusation to satisfy the requirements of the federal Constitution. The same objection to an information which followed the provisions of section 951 of the same code was made and overruled in *People* v. *Burdg,* 95 Cal. App. 259 (272 Pac. 816), and it was held in the following cases that an indictment charging grand theft in the statutory form gave the defendant all the information necessary as to the nature of the accusation and that proof of any one of the species of theft named in section 484 of the Penal Code is sufficient to sustain the charge (*People* v. *Plum,* 88 Cal. App. 575 (263 Pac. 862, 265 Pac. 322); *People* v. *Campbell,* 89 Cal. App. 646 (265 Pac. 364; *People* v.

Lalor, 95 Cal. App. 242 (272 Pac. 794); *People* v. *Wickersham,* 98 Cal. App. 502 (277 Pac. 121)). The amendment to section 484 (Stats. 1927, p. 1046) in connection with other cognate legislation, such as amendments to sections 951 (Stats. 1927, p. 1043) and 952 (Stats. 1927, p. 1043; Stats. 1929, p. 303) of the Penal Code, was designed to simplify procedure (*People* v. *Myers,* 206 Cal. 480 (275 Pac. 219)). And the effect of section 484 is to merge the former crimes of larceny, embezzlement, and obtaining property by false pretenses into the one crime of theft (*People* v. *Plum, supra; People* v. *Palmer,* 92 Cal. App. 323 (268 Pac. 417)).

There is nothing in this legislation which deprives the accused of his rights under the section of the article of the Constitution upon which appellant relies, namely, the right to appear and defend, or which supports the contention that a judgment based upon pleadings in the statutory form would be an insufficient protection against another prosecution."

The case of *People* vs. *Berg,* 96 Cal. App. 430, 432, contains this definite language:

"It is contended that sections 951 and 952 are in violation of that portion of the fourteenth amendment to the constitution of the United States to the effect that no one shall be deprived of his liberty without due process of law, but we think it plain that they are not. We think the constitution of the United States requires no more specific statement of the nature of appellant's alleged offense than that contained in the information."

In *People* vs. *Covington,* 1 Cal. (2d) 316; 34 Pac. (2d) 1019, the Supreme Court of California says, at page 319:

> "'In support of the appeal the first point suggested is that the information failed to charge the offense of robbery, or any public offense. By the direct terms of the information the defendants were, in general terms, accused of the crime of robbery. But it is contended that the accusation, a substantial part of which we have quoted, is insufficient to allege a public offense "in that it does not contain words sufficient to give the accused notice of the offense of which he is accused." In other words it is contended that the information does not comply with the requirement of Penal Code, section 950, that in charging an offense each count shall contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." But the rule governing this requirement is more particularly stated in section 952, as amended in 1927, and further amended in 1929. Among other things, it is there provided that the statement that the accused has committed the specified public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." We think that the information charged commission of the crime of robbery in terms which sufficiently com-

ply with the requirements of the code. *The state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty and property in all the states.* (*People* v. *Robinson,* 107 Cal. App. 211, 217 (290 Pac. 470).) *This fact disposes of the contentions of appellants that their conviction under this information is in violation of their constitutional rights. . . .*'"

In the case of *People* vs. *Ilderton* (1936), 14 Cal. App. (2d) 647, 649; 58 P. (2d) 986, the Court holds that "the question is no longer debatable":

"Defendant * * * raises four grounds for reversal of the order.

(1) That section 952 is unconstitutional because it does not require a full statement of the particulars of the offense so that the defendant may know whether he is charged with larceny, embezzlement, obtaining money by false pretenses, or with any of the other unlawful means of taking the property of another. *The constitutionality of the section has been sustained repeatedly and the question is no longer debatable.* (See *People* v. *Robinson,* 107 Cal. App. 211, 217 (290 Pac. 470).)."

That states may regulate procedural matters in their own courts, subject only to well-known provisos, is fundamental.

The leading cases are all in conformity upon the four general requisites with which due process is concerned. They are as follows:

(1) Notice of some charge or charges being brought against the defendant;

(2) The hearing pursuant to said charges;

(3) Before some court or board having jurisdiction of the charge or charges; and

(4) The orderly process of the trial or hearing according to the equal protection of the laws. That is to say, the laws under which the particular defendant is being tried must be of equal importance to all other citizens who might come before the same tribunal on the same charges.

Jordan vs. *Massachusetts* (Mass. 1912), 225 U. S. 167; 32 S. Ct. 651; 56 L. Ed. 1038.

The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution.

Brown vs. *New Jersey* (N. J. 1899), 175 U. S. 175; 20 S. Ct. 77, 44 L. Ed. 119;

Roller vs. *Murray* (W. Va. 1914), 234 U. S. 738, 34 S. Ct. 902, 58 L. Ed. 1570.

If the Supreme Court of a state has acted in consonance with the constitutional laws of the state *and its own procedure,* it could only be in very exceptional circumstances that the Supreme Court of the United States would feel justified in saying that there had been a failure of due legal process. The

party must have been deprived of one of those fundamental rights the observance of which is indispensable to the liberty of the citizen.

Allen vs. *Georgia* (Ga. 1897), 166 U. S. 138, 17 S. Ct. 525, 41 L. Ed. 949.

From our schoolboy days we were told by learned professors of the twilight zones of shaded difference between these three related crimes. In the interests of progress and of streamlining legal procedure many states have amalgamated the three felonies. That such a step is constitutional there can be no doubt. The exaltation of form is no longer an attribute of law. The bogies of technical pleading are being forced into extinction by lawyers and judges of substance.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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